No. 3205

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TWENTY ONE MINING COMPANY
(a corporation),
Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC.
(a corporation),
Appellee.

BRIEF FOR APPELLEE.

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Appellant,
vs.
Original Sixteen to One Mine, Inc.
(a corporation),
Appellee.

BRIEF FOR APPELLEE.

Statement of Case.

Certain facts appear in the record which we desire to emphasize. A cross-section showing the vein on its dip and the relation to the Sixteen to One shaft and workings appears at page 51 of the record and will aid in understanding the physical situation.

Appellee is the owner of the Sixteen to One lode Mining Claim in which the Sixteen to One vein apexes. Appellant's suit necessarily proceeds on the assumption that appellee, by virtue of a decree rendered by the court below, in Equity Suit 292, has the right to mine the vein in question, as it

extends extralaterally beneath the surface of appellant's Belmont and Valentine Mining Claims (Complaint, pp. 4-5 of Record). Appellant alleges in its complaint that if appellee is unable to excavate workings outside of its vein boundaries that it cannot mine this vein *"without the expenditure of large amounts of money which would be necessary to perform said mining and work within the limits of said vein"* * * * (Record p. 6) and prays for an injunction restraining appellee from going "outside the limits or boundaries of said vein" * * * (Record p. 7).

In support of its application for a preliminary injunction appellant also filed the affidavit of Frank L. Sizer where he states, that the vein in question "is undulating and waving in its character and of variable width, narrowing down in some instances to about two feet between the walls thereof" (Record p. 20) and that if appellee follows the practice of running its workings on a straight course instead of following each undulation or waive it will necessarily depart from said vein and excavate its workings in country rock (Record p. 21) and quotes the statement of S. B. Connor contained in an affidavit filed by said Connor in another proceeding where said Connor stated that it was the "universal practice" to follow a vein by straight workings and that in running the Sixteen to One workings the best judgment was used and that they were justified from the standpoint of economic and practical mining and that it would

be a practical and economic impossibility to keep these workings entirely within the vein (Record p. 19.)

Appellee in its answer admits that if it be compelled to follow all the sinuousities, curvatures and variations of its vein and must keep within the strict and technical limits and wall boundaries thereof, that it cannot work said vein without the expenditure of large amounts of money. It further alleges that it has been departing and only intends to depart from its vein to the very limited extent reasonably necessary to economic and profitable working as is customary in carrying on mining operations under similar circumstances. It further alleges that *appellant will suffer no damage whatever by reason of the excavation and removal of the small quantities of barren and worthless country rock incident to the mining of the vein through such mine openings* as are reasonably necessary, ordinary and customary (Record pp. 12-15).

These statements are corroborated by the counter-affidavits filed by appellee. S. P. Connor, with over forty years of mining experience, states that the Sixteen to One shaft is the main working shaft of the mine and was run beneath but in close touch with the vein because it was necessary in order to keep it comparatively straight on account of the flattening of the dip of the vein in depth, because of the faulted condition above, and because the foot-wall rock was more solid and required less timber-

ing and that this position of the shaft was thoroughly justified from the standpoint of economic mining (Record pp. 28-30).

Thomas Gill, actively engaged in mining for 21 years, and foreman for the North Star Mines Company at the Champion Mine, states that it was reasonably necessary to drive the Sixteen to One shaft in the position it now occupies and that it was safer and cheaper to drive in the footwall. That the ore chute at the 300 level was reasonably necessary and it is common practice to cut such chutes in the hanging wall (Record pp. 35-36).

Elisha Hampton, a practical miner for more than fifty years, with a wide experience in California mines and for two years general superintendent of the famous Goldfield Consolidated Mine, in Nevada, states that driving a shaft, as the Sixteen to One shaft was driven, in the footwall of the vein was good practice and commonly done in mining and that it is of the utmost importance to keep the main working shaft of a mine on a uniform grade or pitch. This tends to efficiency and safety and where a vein is faulted and broken as this one is, it would be dangerous and highly inadvisable to carry the main working shaft along the course of the vein, and it was highly advisable and necessary to drive the main working shaft of the Sixteen to One mine into the footwall as was done in this case and that such course is in accordance with the customs of good mining. The same is true of the ore chute driven into the hanging wall. That in

many of the mines where he had experience the shaft was driven into the footwall and gradually flattened out with depth (Record pp. 38-39).

Dr. Andrew C. Lawson states that in his wide experience in all parts of the world and particularly where veins are faulted, "it is *necessary* in many instances to penetrate country rock in order to follow the faulted segment of the vein" and working should be kept as straight as possible for economic reasons and where a vein has undulations and rolls it would be *impossible* in many instances and highly impracticable from an economic standpoint to follow the vein, also that the Sixteen to One workings in question are "reasonably necessary for the operation of the Sixteen to One Mine from an economic standpoint and in entire accordance with the usages and customs of modern mining as observed by him in other mines" (Record pp. 40-41).

A. Werner Lawson states that the Sixteen to One vein rolls and varies greatly in width in various parts of the mine and is faulted in places so that it would be "a *practicable impossibility* as well as a great economic disadvantage" to follow the vein with the main working shaft. That it is also a universal mining custom to cut ore pockets, chutes, etc., in the country rock for practical and economic reasons, etc. (Record pp. 41-42).

M. C. Sullivan, the superintendent of the appellee company, explains fully his reasons for running the main working shaft underneath the vein in solid

wall rock and that he used the utmost good faith in confining his operations as near the vein as reasonably practicable or possible. That these workings near the vein have been run in worthless and waste country rock and cannot possibly cause appellant any detriment or damage whatsoever (Record p. 44).

W. L. Williamson, who has mined for thirty years past and superintended mining operations in many of the mining states of the west, states that to sink the Sixteen to One shaft in the footwall as has been done is not only advisable, but also reasonably necessary; that it would be "poor mining to confine the shaft to the walls of the vein" and that "it is impossible to extract and remove the ore with safety or efficiency where the main shaft follows the irregularities of the vein" (Record pp. 46-47).

N. S. Kelsey, manager of the Argonaut Mine, one of the most important gold producers in the State, says that it is common mining practice and *necessary* to avoid prohibitive expense to keep the grade of the main working shaft uniform and that it is proper and ordinary mining to cut into the walls of the vein to construct ore pockets, chutes, and stations. That the lower portion of the Argonaut shaft, some 4000 feet in depth, departed quite materially from the vein underneath the surface of claims owned by other persons.

At the hearing in the court below, on the preliminary injunction, counsel for appellant stated in response to an inquiry from the court that the sole question involved and presented for determi-

nation was whether in mining the Sixteen to One vein extralaterally the appellee was confined to working entirely within the walls of its vein or whether it had the right to cut into the country rock on either side of the vein where *necessary* for its mining operations, either to keep its workings straight or regular, as is customary in such operations, where the vein undulates or changes in direction or where the vein narrowed down to width less than the convenient and ordinary width of the usual mining operations; appellant's contention being that the right of the plaintiff was confined to operations entirely within the walls of the vein and that those walls could not be transgressed, no matter how narrow the space (Record p. 33). The court immediately recognized the inequity of this doctrine and the gross hardship that would be imposed on the mining industry if it were accepted and denied the application.

Summary of Facts.

To summarize, the following facts are undisputed:

1. Appellee has been awarded this vein by decree of the court below in Equity suit No. 292.

2. A jury has also found that appellant was a trespasser and had unlawfully extracted gold from this vein (see Appeal No. 3188 dismissed by order of this court) .

3. Appellee, in carrying on its mining operations on this vein extralaterally beneath the surface of appellant's claims, has kept as close to the vein as practicable and as established by the affidavits of some of the leading and most experienced mining men on the Coast, it has followed common mining practice and universal mining custom in so doing.

4. The main working shaft of the Sixteen to One Mine has been kept as close to the vein as practicable and for reasons of safety and economy has been sunk in the footwall, but a few feet below the vein and it would be a practical impossibility as well as dangerous for this shaft to follow all the curvatures and rolls and variations of the vein.

5. The ore chute and pocket extending into the hanging wall of the vein from the 300 ft. level, is an ordinary and customary working designed to facilitate the extraction and loading of ore.

6. These slight departures of appellee's workings from the vein have not caused appellant one cent of actual damage because they are all in barren wall rock.

7. To compel appellee to confine its workings within the actual walls of the vein would be a practical impossibility in many places, would be contrary to common mining practice and experience, would be a great economic hardship and in the language of appellant's complaint would result in "the expenditure [by appellee] of large amounts

of money which would be necessary to perform said mining and work within the limits of said vein".

In short, appellant having lost the vein is endeavoring to put appellee to as much unnecessary expense and trouble as possible in mining its vein even though appellant will not suffer one particle of actual damage if appellee continue to mine in accordance with plain, ordinary mining methods dictated by common sense and mining experience.

The Question Involved.

The single point at issue is whether appellee in mining its vein extralaterally is confined to the vein itself and must keep strictly within its technical wall boundaries and limits or whether it has a reasonable and common sense latitude and can mine as other veins are ordinarily mined under similar circumstances.

In other words, the sole question for determination is whether or not the mining statute granting the extralateral right has granted a barren, abortive right, which would be the case in many instances, if appellant's narrow and restrictive contention prevail.

Outline of Argument.

Appellee is confident that it will readily establish the following propositions:

I. That the extralateral grant contained in the mining statute, by its express terms contemplates that the vein owner mining extralaterally shall *enjoy* such right in a rational and common sense manner.

II. That the right to follow a vein extralaterally granted by the federal mining act is the essential right granted as far as lode claims are concerned and this portion of the statute should be liberally construed.

III. That in construing a statute it is the duty of the court to carry into effect its manifest purpose and not to defeat this purpose by technical rules of construction.

IV. That the St. Louis-Montana decisions rendered by this court and also by the United States Supreme Court, while not bearing directly on the question here involved, distinctly recognize that a vein owner in pursuing a vein extralaterally must have a reasonable latitude in such exploration.

V. That the rights conveyed by the extralateral grant are directly analogous to those flowing from the ordinary grant and severance of a vein from the overlying surface as far as the working of that vein with respect to the rights of the surface owner is concerned.

VI. That the enjoyment of the main right to the severed vein presupposes and carries with it all incidental rights that are reasonably necessary for the profitable and economical extraction of the ore.

VII. That in the consideration of a case of this character where a great and vital principle is involved which will seriously affect the lode mining industry, a court of equity should so construe the act in question as to result in the least hardship to all concerned, including the public.

I.

SECTION 2322 U. S. REV. STATS., GRANTING THE RIGHT TO FOLLOW A VEIN EXTRALATERALLY, GRANTS NOT ONLY THE "POSSESSION" BUT THE "ENJOYMENT" OF THE EXTRALATERAL SEGMENT.

Section 2322 U. S. Rev. Stats., gives the locator of a mining location not only the "exclusive right of possession *and enjoyment*" of his surface location, but also *"of all lodes, veins and ledges throughout their entire depth,* the top or apex of which lies inside of such surface lines extended downward vertically". It is to be noted that not only is the locator given the right of possession of his vein extralaterally on its downward course, but he is also given the *right of enjoyment.* And compliance with the statute is equivalent to a grant.

> "A valid and subsisting location of mineral lands * * * has the effect of a grant by the United States of the right of present and exclusive possession."
>
> *Gwillim v. Donnellan,* 115 U. S. 45, 49.

* Italics in this brief are ours.

"The *right of lateral pursuit* is a right conferred by statute. It does not depend upon circumstances, and *is as absolute as the ownership of a vein apexing within the surface lines,* save that it ceases when and at the point that it interferes with the statutory rights of another." Morrow, C. J.

St. Louis M. & M. Co. v. Montana M. Co., (8th C. C. A.) 104 Fed. 664, 668.

"Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. * * * Not only is he entitled to all veins whose apices are within such limits, *but he is entitled to them throughout their entire depth.* * * *"

Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 88.

"The locators 'of any mineral veins, lode or ledge' are given not only 'the exclusive right of possession *and enjoyment*' of all the surface included within the lines of their locations, but 'of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically'."

Calhoun Gold M. Co. v. Ajax Gold M. Co., 182 U. S. 499, 508.

"Extralateral rights are not a mere incident or appurtenance but a substantial part of the property itself which is the subject of the grant. They are not susceptible of a more definite description than that contained in the statute, which the patent follows, because the conditions beneath the surface cannot be ascertained prior to the issuance of patent."

Montana Ore Purchasing Co. v. Boston etc. Co., (Mont.) 70 Pac. 1114, 1124.

The general principles enunciated above are elementary but sustain the conclusion that the statute virtually grants to the locator the right to follow the vein extralaterally and gives him not only the right of possession, which in many instances if narrowly and technically confined to the vein itself would prove a barren and worthless right, but Congress in its wisdom also conferred on the locator the right of enjoyment of the thing of value granted. Instead of intending that an absurd and abortive result should follow from its grant of the vein and the right of possession thereto, as would be the case if the miner did not have the correlative right of mining the vein granted in a reasonable and ordinary and customary manner, Congress also gave him the distinct right of enjoyment so that he might fully enjoy the fruits of the grant of the vein.

II.

THIS GRANT TO FOLLOW THE VEIN EXTRALATERALLY IS THE MOST VALUABLE RIGHT CONFERRED BY THE STATUTE AND IS TO BE CONSTRUED LIBERALLY.

In *Consolidated Wyoming Gold Mining Co. v. Champion Co.,* 63 Fed. 540, 548-9, Judge Hawley, one of the great mining jurists of the West, in speaking of this extralateral grant of the mining statute to the locator, said:

> "*It should be liberally construed in his favor so as to give him the full benefit of the statute in its true spirit and intent in* order to carry

out the wise and beneficent policy of the general government in opening up the mineral lands for exploration and development. * * * One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be *to preserve in all cases the essential right given by the statute to follow the lode upon its dip* as well as on the strike, to so much thereof as its apex is found within the surface lines of his location."

The Supreme Court of the United States in *Del Monte Co. v. Last Chance Co.,* 171 U. S. 55, 66-67, in speaking of this statute, says:

"The primary thought of the statute is the disposal of the mines and minerals, and in the interpretation of the statute *this primary purpose must be recognized and given effect.* Hence, whenever a party has acquired the title to ground within whose surface area is the apex of a vein with a few or many feet along its course or strike, *a right to follow that vein on its dip for the same length ought to be awarded him if it can be done,* and only if it can be done, *under any fair and natural construction of the language of the statute.*"

See also the case of *Tyler Mining Co. v. Last Chance Mining Co.,* 71 Fed. 848, 851.

"When, then, he owns an apex, whether it extends through the entire or through a part of his location, it should follow he owns an equal part of the ledge to its utmost depth. *These are the important rights granted by the law. Take them away and we take all from the law that is of value to the miner.* Courts will not fritter them away by ingrafting into the law antagonistic common-law principles, or other judicial legislation."

The major portion of the foregoing language was quoted with approval by the Supreme Court of the United States in the *Del Monte case,* 171 U. S. 55, 91. In commenting on this portion of the *Del Monte case,* Judge Lindley says it

> "is a clear enunciation of a wholesome principle which prevents the 'frittering away by construction' *of the most valuable right granted by the mining laws".*
>
> *Lindley on Mines,* Sec. 592.

In *Calhoun G. M. Co. v. Ajax Gold M. Co.,* 182 U. S. 499, 508, the court says:

Under the Act of 1872, "the vein is still the principal thing in that it is for the sake of the vein that the location is made" * * *

> * * * * *"It is not competent for us to add any other condition."* (p. 509.)

And in the recent case of *Jim Butler Tonopah Min. Co. v. West End Con. M. Co.* (38 Sup Ct. Rep. 574), decided by the Supreme Court of the United States, June 10, 1918, the court says that "the extralateral right so created is subject to three limitations". An apex must exist in the claim, the vein can only be followed in its course downward and not on the strike, and only between end line planes; *"but otherwise it is without limitation or exception".*

And in Sec. 866 of *Lindley on Mines,* Judge Lindley says in interpreting this extralateral grant,

> "nor are questions of doubtful construction of the mining laws to be resolved against it".

"The mining laws were passed for the development of the mineral resources in the public domain of the United States and should therefore *receive a liberal interpretation.*"

Jefferson-Montana Copper Mines Co., 41 L. D. 320.

III

IN THE INTERPRETATION OF A STATUTE THE EFFORT OF THE COURT ALWAYS IS TO CARRY INTO EFFECT ITS MANIFEST PURPOSE.

In *Oates v. National Bank,* 100 U. S. 239, the court, at page 244, says

> "* * * The duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction. * * * And we should discard any construction that would lead to absurd consequences. United States v. Kirby, 7 Wall. 482. We ought, rather, adopting the language of Lord Hale, to be 'Curious and subtle to invent reasons and means' to carry out the clear intent of the law-making power when thus expressed."

In *United States v. Jackson,* 143 Fed. 783, the court says, at page 786:

> "* * * Courts should search out and follow the true intent of Congress, and adopt 'the sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and object of the legislation."

In *Ex parte Ellis,* 11 Cal. 222, the following statement is found:

> "When a particular construction of a statute, applied to a case which it seems by its terms to include, there follows from such a construction an absurd consequence; respect for the legislature will induce the court from thence to conclude that some other construction which will not produce such a consequence, ought to be adopted. Hence every construction which leads to an absurdity ought to be rejected. (Smith's Com. 663.) * * * it is impossible for the legislature to enter into immensity of detail. It can only make laws in a general manner, and in applying their acts to particular cases, the construction ought to be conformable to the intention of the legislature."

In *Castner et al. v. Walrod,* 83 Ill. 171, it is said, at page 179:

> "Every statute should be construed with reference to its object, and the will of the lawmaker is best promoted by such a construction as secures that object, and excludes every other."

IV.

ST. LOUIS MINING CO. V. MONTANA MINING CO. RECOGNIZES THE NECESSITY OF A SPECIAL RIGHT OF EXPLORATION INCIDENT TO THE RIGHT TO FOLLOW DOWN IN OR UPON THE VEIN.

The only case remotely bearing on the subject of the right of an extralateral proprietor to enter beneath the surface of an adjoining mining claim is the so-called *Drumlummon Case* cited by opposing

counsel (*St. Louis Mining Co. v. Montana Mining Co.,* 194 U. S. 235). The question involved in that case was the right to crosscut underneath the surface of an adjoining claim at a place remote from the vein in order to intersect the vein on its downward course. The rights of the apex proprietor incident to following his vein on its "downward course" underneath adjoining surface were not even remotely involved. The court did intimate by way of dictum purely, that an extralateral proprietor would be "in pursuing and appropriating this vein confined to work in *or upon* the vein". Clearly, the case is not authority here where appellee is following down "in or upon" the vein and is not attempting to mine by crosscutting to the vein through the subsurface of adjoining territory. Even if we examine the language of this dictum, which in any event was only thrown out incidentally without any attempt to define the extent of the right to follow the vein, it clearly supports appellee's contention. If the court had intended to strictly confine extralateral operations *in* the vein itself, as is contended for by appellant here, it would not have used the language "or upon". The use of the word "or" indicates another alternative than that expressed by the word "in". The alternative word "upon" must have been used advisedly. If we examine the Century Dictionary as to the meaning of the word "upon", it is found to be practically synonymous with "on". And the word "on" as used in this sense of relative position is defined to mean, "at, near or adjacent to—expressing near

approach". All of appellee's workings are either in or upon the vein in this sense. Therefore, even if *St. Louis v. Montana* can be taken to apply to a state of facts which was not presented to that court, its dictum clearly supports defendant's contention. It will also be noted that Judge Brewer in that case distinctly held that the apex proprietor had "*the right to pursue a vein,* which on its dip enters the subsurface" of another. He does not confine his right to the vein which would often result in defeating the entire purpose of the statute.

We find further support for this contention in the same case decided by this Circuit Court of Appeals (113 Fed. 900, 902), where Judge Gilbert speaking for this court said that the extralateral proprietor

> "is confined in his right to operations within or *upon* the vein itself" and has no "*general* right of exploration within the land of an adjoining patented claim."

Judge Gilbert unquestionably used the expression "general right of exploration" advisedly, having in mind the fact that in following down on his vein the miner must, of necessity, have an incidental and special right of exploration, limited, of course, to that particular purpose.

Appellee is not here contending for any general right of exploration beneath its neighbor's ground, but only for the incidental right of following its vein in a reasonable manner so that it may receive the full benefit of this grant contained in the mining act.

V.

THE EXTRALATERAL GRANT HAS THE EFFECT OF SEVERING THE VEIN FROM OVERLYING SURFACE AND CARRIES WITH IT ALL INCIDENTAL RIGHTS REASONABLY NECESSARY FOR ITS FULL ENJOYMENT.

The extralateral grant is in legal effect a severance of the estate in the extralateral portion of the vein from the surface under which it passes. In this respect it is in strict accord with the common law principle of severance.

> "The grant of the right of lateral pursuit is, in legal effect, a severance of the estate in the vein from the ownership of the soil into which it penetrates after passing on its downward course beyond the vertical planes drawn through the surface boundaries of the location or patent."
>
> *Lindley on Mines,* 3rd Ed. Sec. 568.
>
> "Therefore when the government grants a vein throughout its entire depth within certain end line planes, the title to the vein is severed out of the adjoining land into which it penetrates, and the estate in the land overlying the dip is to that extent lessened. Instead of being in derogation of the common law this class of grants is in absolute harmony with it. It is not true, therefore, that the statute should be strictly construed because it contravenes the common law" * * * (Id.)
>
> "This grant of the fee in the vein may be accompanied by certain easements. To illustrate: The right to follow the vein into adjoining lands frequently cannot be exercised without disturbing some portion of the inclosing rock. The grant of the vein carries with it whatever is reasonably required for its enjoyment and without which the grant would be ineffectual." (Id.)

> "The underlying principles involved may be thus expressed: The proprietor of the minerals has a right to win them. In exercising this right all privileges reasonably necessary for its full and fair enjoyment are necessarily implied; but these privileges must be exercised with due care and in a lawful manner, so as not to wantonly or unnecessarily interfere with the rights of the surface owner."
>
> *Lindley,* Sec. 812.

> "A grant of minerals implies the right to win them from the underlying soil." * * * "He may use the underlying stratum of the containing chamber for drainage, support for tramways and the like." (Sec. 813a.)
>
> "As heretofore noted, the miner is authorized to use such means and processes for the purpose of mining and removing the minerals as may be reasonably necessary in the light of modern invention and of the improvements in the arts and sciences." (Sec. 814.)

Snyder on Mines, Sec. 789, states that for the purpose of extralateral pursuit

> "The miner has the right to dig all needful shafts and run all necessary drifts and tunnels, levels and stopes" * * *

and he may have

> "proper avenues for the removal of all ores belonging to him".

As has been noted, the extralateral sweep of a vein with respect to the overlying surface produces a situation identical to that existing under the common law principle of severance of a vein from surface ownership and the vesting of these respective properties in different persons. The surface owner,

with one point of distinction, has the same right to his surface and all the subsurface excepting only the vein of mineral as it extends beneath the surface, where the severance has taken place at common law, as is the case with the surface owner underneath whose surface a vein extends extralaterally. One point of distinction exists through the fact that the surface proprietor under common law severance must often yield up enough surface and subsurface so that the owner of the minerals can sink from the surface and reach the vein in depth, while the apex proprietor under the mining statute reaches the extralateral segment of his vein subjacent to the adjoining surface by following the vein down from the apex in his own ground. However, when once the vein is encountered beneath adjoining surface under either system of law the principles governing and rights incident to the mining of the vein are identical in every respect.

VI.

A GRANT OF THE MINERAL UNDERLYING THE SURFACE OF LAND OWNED BY ANOTHER CARRIES WITH IT BY IMPLICATION THE RIGHT TO DO WHATEVER IS REASONABLY NECESSARY FOR THE BENEFICIAL USE AND ENJOYMENT OF SUCH MINERAL.

It is held in these common law cases that the surface owner is entitled to everything beneath the surface (just as was held in the *St. Louis-Montana Case*), except the vein and the incidental rights necessary to reach and properly mine the vein. This right to the vein, however,

"necessarily implies the right to use or remove such portions of the containing strata as may be necessary or proper for the convenient and proper removal of the mineral itself. This is strikingly manifest in both of the cases at bar. In one of these it appears that the coal vein in the field in which the Indian Camp Coal Company is operating averages about four feet in thickness; and in the other that the coal vein where the Emma mine is located is from 30 to 38 inches in thickness. It is evident that if the mine-owner is to be restricted to the exact limit of the thickness of the vein of mineral with no right to remove any portion of the superimposed strata for necessary headway in working, or in making the mine secure, or with no right to use or remove any portion of the underlying strata for drainage, support for tramways and the like, the grant to him of ownership in the mineral would be of little practical value or none at all."

Moore v. Indian Camp Coal Co., (Ohio) 80 N. E. 6, 7-8.

Where he has the right to the mineral, he has the right

"to use such means and processes for the purpose of mining and removing them as may be reasonably necessary, in the light of modern inventions, and in the improvement of the arts and sciences * * * these incidental rights of the miner, which are appurtenant to the grant of the mineral rights are to be gauged by the necessity of the particular case", and are such "as are *ordinarily used in such business* and may be reasonably necessary for the *profitable and beneficial enjoyment* of his property".

Williams v. Gibson, (Ala.) 4 So. 350, 352-354.

Title of the owner of the mineral is an estate in fee,

> "and in exercising this right, the miner has the incidental right for *the removal of so much of the containing strata as may be reasonably required for the operation of mining*". * * *
>
> *Sharum v. Whitehead Coal Mining Co.,* (8 C. C. A.) 223 Fed. 282, 290-291.

> "In every private grant there passes by implication that which is reasonably necessary to the enjoyment of the thing granted. Washburn on Easements (4th Ed.) pp. 49-54. Hence a grant of the minerals under the surface of the land implies the right to mine them by the sinking of shafts or boring of tunnels and the removal of them through such openings." * * *
>
> "Because a mine may not be worked *practically* without other facilities, the *grant of the minerals implies the right * * * in general to do that which is reasonably necessary for the use of the thing granted* * * * it is not requisite to an implied grant that there is an absolute physical necessity for the right demanded."
>
> *Himrod v. Fort Pitt M. & M. Co.*, 220 Fed. 80, 82-84 (8 C. C. A.).

See also the case of *Sheets v. Seldens Lessee,* 69 U. S. 177, 187-8, holding that

> "the true rule on the subject is this, that everything essential to the beneficial use and *enjoyment* of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance",

and Mr. Justice Field cites many instances.

This rule is also supported by the California decisions, Judge Field having also written the following:

> "The true doctrine we conceive to be this, that *everything essential to the beneficial use and enjoyment* of the property designated is, in the absence of language indicating a different intention on the part of the grantor to be considered as passing to the grantee; or as observed by Mr. Justice Story in Whitney v. Olney, 3 Mason 280 'the good sense of the doctrine on this subject is that under the grant of a thing, whatever is parcel of it, or the essence of it, *or necessary to its beneficial use and enjoyment,* or by any common intendment is included in it, passes to the grantee'."
>
> *Sparks v. Hess,* 15 Cal. 186, 196.

> "But we think that whatever realty is incident or appurtenant to the mineralized ground worked as a mine—whatever would pass by a conveyance of the mine itself as an appurtenance thereto—is within the meaning of the requirement (mining ground). The transfer of a thing transfers all of its incidents and appurtenances." (Civil Code, Sec. 1084.)
>
> *McShane v. Carter,* 70 Cal. 310, 313, 315.

> "Whatever is indispensable to the exercise of the privilege (mining for gold) must be allowed him; *else it would be a barren right, subserving no useful end.*"
>
> *Clarke v. DuVal,* 15 Cal. 85, 88.

> "This right carries with it all incidents necessary to the full *enjoyment* of the right to take the gold.'
>
> *Hodgson v. Field,* 7 East 613.

"The general rule of law is, that when a party grants a thing, he by implication grants whatever is incident to it or necessary to its beneficial *enjoyment*. The incident goes with the principal thing."

Cave v. Crafts, 53 Cal. 135, 140.

"A 'mining right' upon a specific piece of ground is a right to enter upon and occupy the ground, for the purpose of working it, either by underground excavations or open workings, to obtain from it the minerals or ores which may be deposited therein. By implication the grant of such a right carries with it whatever is incident to it and necessary to its beneficial *enjoyment*."

Smith v. Cooley, 65 Cal. 46, 57.

"A grant of a tunnel right carries with it by implication every incident and appurtenant thereto—including right and easement necessary for the full and free *enjoyment* of the tunnel right."

Scheel v. Alhambra Min. Co., 79 Fed. 821, 825.

"The express grant of a particular right carries with it by implication the additional right, sometimes called a secondary easement, of doing whatever is reasonably necessary for the *enjoyment* of the right granted."

Willoughby v. Lawrence, (Ill.) 4 N. E. 356, 360.

"The law conclusively presumes it to be the intention of the parties that the grantee shall *enjoy* beneficially the subject of the grant."

White v. Eagle Co., (N. H.) 34 Atl. 672, 674.

See, also, *Ingle v. Bottoms,* 66 N. E. (Ind.) 160, 162.

> "A grant of minerals in the land gives a right to mine for them * * * *The owner of the mine may keep pace with the progress of invention and ingenuity, so far as is necessary to a profitable working of his property* in competition with rivals."
>
> *Martin v. Bowster Im. M. Co.,* 55 N. Y. 538; 14 A. R. 222, 328-333.

See, also, *Baker v. Pittsburg R. Co.,* (Pa.) 68 Atl. 1014, 1015 to 1016.

> "The maxim of the law is that whoever grants a thing is supposed also tacitly to grant that without which the grant would be of no avail. Where the principal thing is granted the incident shall pass (Co. Litt., 152).
>
> *Jackson v. Trullinger,* 9 Ore. 393.

The same rule of the law applies in England and was in force as a part of the common law that was adopted in America.

> "When anything is granted, all the means to attain it and all the fruits and effects of it are granted also and shall pass inclusive together with the thing by the grant of the thing itself without the words *cum pertinentiis,* or any such like words * * * by the grant of mines is granted power to digge them * * * "
>
> *Sheppards Common Assurances* (Touchstone), p. 89.
>
> "Where minerals are granted the presumption is that they are to be enjoyed, and that a power to get them is also granted as a necessary incident. (See par. Ld. Wensleydale Rowbothen v. Wilson, 8 H. L. Cas. 360).

"So it has been observed that when the use of a thing is granted, everything is granted whereby the grantee may have and enjoy such use" (and where coal mines are reserved out of a deed of conveyance of land) all things depending on that right and necessary for its enjoyment were also reserved (as incident in Dand v. Kingscote, 6 M. & W. 174).

Brooms Legal Maxims, pp. 367, 368, 369.

Where a conveyance did not expressly grant the right to work and get the mines or define the rights of working

"all such powers of working were impliedly given as were reasonably sufficient to enable the lord (or his lessees) to get the mines and carry them away".

Bainbridge on Mines and Minerals, 5th ed., p. 363.

"And a power to dig for and work minerals carries with it *the right to remove such parts of the strata as have to be removed* either in making the shafts to win the minerals *or in getting the minerals when won.*"

Macswinney on Mines (3rd ed.), pp. 398-9.

And in Scotland, Stewart says:

"In the case of severance of surface and mineral ownership, the mineral owner is entitled to such use of the other strata * * * as is reasonably necessary for the enjoyment of the mineral estate so severed. * * * In a grant or reservation of minerals there is a prima facie presumption that the minerals are to be *enjoyed;* and, therefore, a power to get them must also be presumed to be granted or reserved as a necessary incident."

Mines and Minerals, pp. 33-34.

We apologize to the court for quoting so extensively on a point that is so self-evident and that is such a well known principle of law, but we feel amply justified in citing to the court a few only of the countless authorities that could be gathered on the subject, in view of the fact that plaintiff has seen fit to bring this action and question the right of defendant to a reasonable latitude in working a vein extralaterally on its downward course, which right of enjoyment has never before been questioned in the long history of Western mining as far as the reported cases indicate.

Reasonable Necessity and Not Absolute Necessity the True Test.

Opposing counsel on page five (5) of appellant's brief states that nowhere in the record does appellee claim that it will be "necessary" for appellee to go outside of the boundary of its vein but that it only desires to do so because it will be more profitable and economical. As a matter of fact absolute and strict necessity is repeatedly shown in the record. Hampton states that it was "necessary to drive the main working shaft" as was done in this case (Record p. 38). The ore pocket and chute was "necessary" (p. 39). Professor Lawson points out that it is "necessary" to cut into the wall rock (p. 40). A. W. Lawson states that it would be a "practicable impossibility to follow the vein in all its variations", etc. (p. 42). Appellant's own affidavit made by Sizer states that in some instances the vein pinches

down to "two feet between the walls thereof" (p. 20) and quotes from Conner's affidavit stating that "it would be a practicable and economic impossibility to follow all the sinuosities of the vein and keep the working entirely within the vein" (p. 19) and also quotes from the verified answer of appellee in another suit where it is alleged that these workings "were *necessary,* essential and proper for such purposes" (pp. 21-22). How anyone can run a working along a two foot vein without cutting into the wall rock or sink a main working shaft on an undulating and faulted vein without doing the same is a problem which yet remains to be solved in the scientific world. In spite of appellant's intimation as to the absence of any claim of necessity on appellee's part, we respectfully submit that such necessity not only definitely appears in the record but is clearly apparent on the very face of the situation.

As a matter of fact, opposing counsel totally misconceive the true rule on the subject. Absolute, compelling necessity of the strict and technical sort is not the character of necessity contemplated by the law on this subject. All that is required is a "reasonable necessity". Appellee's affidavits, not refuted or denied, but on the other hand the statements of which are virtually admitted by appellant in its complaint and supporting affidavit, are overwhelming on the point that appellee's workings are within the bounds of "reasonable necessity".

That the true test is "reasonable necessity" and not absolute necessity is established by practically all of the authorities already cited, but in order to clear up any doubt on the subject, the following are also presented on this special phase of the case:

The Circuit Court of Appeals for the 8th Circuit, in deciding the mining case previously noted, held that the grant of the mineral in land carried with it by implication the right, in general to do that which is reasonably necessary for the use of the thing granted, and also said

> *"it is not requisite to an implied grant that there is an absolute physical necessity for the right demanded."*

> *Himrod v. Fort Pitt M. & M. Co.,* 220 Fed. 80-84.

We commend to this court's attention the full discussion of this subject found on pages 82-84 of the case just cited.

> "The necessity which is to govern is not fixed and unvarying: the right may be exercised in a manner suitable to that business to be carried on * * * and what is perhaps but an expansion of the last proposition, the exercise of the right is not to be confined to the modes in vogue when it was first acquired. The owner of the mine may keep pace with the progress of invention and ingenuity, so far as is necessary to a profitable working of his property in competition with rivals."

> *Marvin v. Brewster Iron Mining Co.,* 55 N. Y. 538.

"The court said that necessary or proper meant (in effect) usual—in other words whatever could not be dispensed with if the mine was to be worked with reasonable efficiency and success was necessary; *scil.* because the word 'necessary' was not to be construed as meaning absolutely necessary but as meaning that which according to the usage of miners working with ordinary skill would be necessary for carrying on the works; and of course whatever was necessary would not be waste, being the ordinary enjoyment of the demised premises" (p. 365).

Bainbridge on Mines and Minerals (5th Ed.).

It is quite evident from the foregoing authority that all that the law requires is that the incidental right shall be reasonably necessary for the beneficial use and enjoyment of the main grant. To accept appellant's contention would mean to overturn all the law on the subject and virtually nullify every grant which did not specify in detail the incidental privileges necessary to give the grantee the beneficial and fair enjoyment of the thing granted.

It is quite clear that the extralateral provision of the mining statute constitutes a grant of the vein to the apex proprietor and results in severing it from the adjoining surface underneath which it dips. That there is no valid distinction between the rights of the apex proprietor to such extralateral segment of the vein underlying adjoining surface and the rights of a common law grantee to the vein which has been severed from the overlying surface. Both are entitled to enjoy the vein granted and both

may exercise all incidental rights reasonably necessary to the full and fair enjoyment of the vein. These incidental rights necessarily include the right to excavate such workings as are ordinary and customary and essential to the profitable and economic working of the vein granted.

VII.

GENERAL PRINCIPLES INVOLVED IN GRANTING INJUNCTIONS OF THIS CHARACTER.

It would seem superfluous to further argue this question in the light of the overwhelming authorities on the merits just cited, but it is important to keep two or three additional principles in mind.

a. **Relative Balance of Convenience and Injury or Doctrine of Comparative Hardships Especially Applicable to Interlocutory Injunctions.**

Opposing counsel state, on pages 21-24 of appellant's brief, that the doctrine of comparative injury has no application in a case of this sort and proceed to cite authority, all of which involved final decrees or a final determination of the question of injunction below. They cite Note to Vol. 31 L. R. A. (N. S.) 881, 888 et seq. An examination of this note will serve to further reinforce the fact that the rule only applies in the case of final decrees. This very note cited, at page 882 subdivision III, points out that the issuance of an injunction *pendente lite,* such as this, is always discretionary. That such is the correct rule is also supported by the following authority:

"It is a settled rule of the court of chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused."

Russell v. Farley, 105 U. S. 433, 438.

In all cases the court takes into consideration the relative inconvenience to be caused to the parties and will refuse an injunction if it appears inequitable to issue it.

Contra Costa Water Co. v. Oakland, 165 Fed. 518, 533 (9th C. C. A., Gilbert, J.);
Peterson v. Santa Rosa, 119 Cal. 387;
In re Arkansas Ry., 168 Fed. 720, 722;
Rhodes M. Co. v. Belleville Placer (Mo.), 106 Pac. 361, 362; also, 118 Pac. 813;
Pac. Tel. & Tel. Co. v. Los Angeles, 192 Fed. 1009;
Magruder v. Belle Fourche Valley W. W. Co., 219 Fed. 72, 82.

"There is no question about the right and duty of a court of equity in issuing injunctions to take into consideration the comparative injury of the different parties to the suit."

Sharum v. Whitehead Coal M. Co., 223 Fed. 282, 291.

"Where one or the other of the parties is to suffer by the granting or refusing of an injunction pending the action the inconvenience likely to be incurred by each from the action of the court in granting or refusing a tempo-

rary injunction should be balanced, and the court should grant or withhold the injunction accordingly."

Williams v. Los Angeles Ry. Co., 150 Cal. 592.

"In the consideration of such cases, it is the duty of the court to consider the inconvenience and damage that will result to the defendant, as well as the benefit to accrue to the complainant, by the granting of the writ; and where the defendant's damages and injuries will be greater by granting the writ than will be the complainant's benefit by granting the writ, or greater than will be complainant's damages by the refusal of it, the court will, in the exercise of a sound discretion, refuse the writ."

Lloyd v. Catlin Coal Co., (Ill.) 71 N. E. 335.

In the case at bar the only possible injury to plaintiff is the removal of a few cubic yards of barren, worthless country rock. On the other hand, to enjoin defendant from cutting into this country rock, which it only claims the right to where reasonably necessary for its legitimate mining operations, would be to seriously hamper if not totally prevent economic mining operations.

b. Public Interest Demands a Denial of the Injunction Sought.

The following authority is of particular interest, in view of the fact that Secretary of the Treasury McAdoo has issued a proclamation to the effect that it is of the utmost importance to the finances of the country that gold mining continue so that the reserve of gold be not depleted.

> "The writ of injunction is not issuable as a matter of right. The comparative injury and benefit which may ensue from its issuance to the respective parties *and to the public* is to be considered by the court, even where the plaintiff's legal right is established. If the benefit to plaintiff from the writ is small, when compared to the injury to defendant *or to the public,* and the injury to plaintiff can be adequately compensated in an action at law, relief by injunction will be denied, and the plaintiff will be left to his remedy in an action at law * * *
>
> *It is to the interest of the public* as well as of the Alabama Mineral Land Company and the defendant, that what coal cannot be recovered through the Savage Creek stope should be recovered through the Garnsey stope; for otherwise it will be lost."
>
> *St. Louis Union Trust Co. v. Galloway Coal Co.,* 193 Fed. 106, 121.

Will plaintiff urge, in the face of the foregoing authority, that they will suffer greater inconvenience if defendant be permitted to continue mining the small amount of country rock incidental to reasonable mining operations, than defendant would suffer if it be put to the great expense, hardship and practical impossibility of mining its vein economically if plaintiff's drastic claims be allowed.

c. Practical Reasons are Opposed to Appellant's Theory.

Looked at from a broader aspect, even, we feel certain that this court is not going to place a permanent hardship and grievous burden upon the mining industry of the West, by the imposition of

any such selfish and narrow doctrine as is here contended for by appellant. It would impose on every extralateral claimant a hardship that in many instances would be absolutely prohibitive and leave him at the absolute mercy of surface proprietors. It would mean the expenditure of immense sums of money in the endeavor to confine mining operations to the technical limits of the vein, and what end would this immense waste of money and capital serve. Nothing but the selfish whims of the surface proprietor, for he would gain nothing (unless it be a whip-hand over all mining underneath his surface) and on the other hand he would not be injured to the extent of one cent of actual damage if the present system of mining be permitted to continue. This dead loss of capital that would subserve no useful end whatsoever, would also be accompanied by the additional danger to life and limb resulting from the necessity of departing from straight workings in solid rock and substituting therefor irregular and impracticable workings in dangerous ground. Surely the public interest is involved in results such as these.

And to what practical absurdities would such a perverted doctrine lead? Suppose the vein pinches to a knife blade (and the courts have said many times in discussing the right to follow a vein extralaterally that this does not destroy the identity so that the miner may not follow his vein) what is the miner to do if he cannot mine into the walls on each side of his crevice? And suppose the vein

is faulted. Faults do not destroy identity or the right of extralateral pursuit. When the miner comes to the fault, he must cease mining, forsooth, because to search for his faulted segment would compel him of necessity to penetrate country rock and if the faulting be complex, he might have to conduct extensive exploration before encountering the faulted segment. Of course, opposing counsel will contend, if they are consistent, that the miner loses his right to follow the vein and such is the misfortune of circumstances. And suppose the vein has two branches or strands, as is true in the case at bar, must a separate working be run on each branch? Suppose the wall boundaries are indefinite and the ore occurs in pockets or bunches and the limit of mineralization fades into the country rock, as is the case in the Coeur d'Alene. Where shall the miner cease under such circumstances and when will the miner be held to have transgressed his rights? It is to such absurd consequences that appellant's contention leads. It would place the miner at the absolute mercy of every stubborn and litigious surface owner and that is just where appellant would place appellee. A court and a jury below have each determined that appellee is the lawful owner of the vein involved, but appellant is seeking here to obtain indirectly the result it cannot accomplish directly, by rendering appellee's victory barren and worthless.

Appellant admits that appellee has been following customary mining methods in its operations and, therefore, this is a case where this court may, in all justice, announce the law governing extralateral operations under similar circumstances. We welcome the announcement by this court of the law applicable to these facts here presented, since such a declaration of principle will serve as a guide to the court below when the identical problem is presented at the main hearing for final determination there.

With every confidence that this court will uphold and fortify the interests of the miner by allowing him the same reasonable latitude in conducting his extralateral operations as is customary under like circumstances in ordinary mining operations and that a narrow, distorted and unreasonable construction such as that contended for by appellant, of what Congress intended should prove a wise and beneficent statute, will never be sanctioned by this or any other court in the land, this brief is respectfully submitted.

Dated, San Francisco,
October 24, 1918.

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